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No. 82-1851  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM 1982  
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**JAMES PENDLETON AND SAMUEL THOMPSON,**  
*Petitioners,*

v.

**UNITED PARCEL SERVICE AND TEAMSTERS  
LOCAL NO. 667,**  
*Respondents.*

\_\_\_\_\_  
**BRIEF OF RESPONDENT UNITED PARCEL  
SERVICE IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**  
\_\_\_\_\_

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### **QUESTION PRESENTED FOR REVIEW**

In a suit under § 301 of the LMRA brought by petitioners to overturn a grievance award, was there any basis on which the court of appeals should have reversed the district court's grant of summary judgment in favor of respondents?

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## STATEMENT

By their petition for writ of certiorari, plaintiffs James Pendleton ("Pendleton") and Samuel Thompson ("Thompson") seek to have this Court review and reverse a decision of the United States Court of Appeals for the Sixth Circuit, two decisions of the United States District Court for the Western District of Tennessee, and two decisions of grievance committees, all denying relief to the plaintiffs.

Pendleton and Thompson were both employed by United Parcel Service ("UPS") as tractor trailer (feeder) truck drivers at its operating center in Memphis, Tennessee. While driving company tractor trailers on an interstate highway both lost control of their vehicles near the same location and caused serious damage to them. Thompson's March 30, 1979, accident caused damages to his vehicle of approximately \$47,200; Pendleton's accident on April 26, 1979, caused \$7,100 in damages to his vehicle. (35a).<sup>1</sup>

UPS notified Thompson and Pendleton of their discharge for "recklessness resulting in a serious accident while on duty," pursuant to Article IX of the collective bargaining agreement in effect between UPS and Teamsters Local No. 667 ("the Union") at the time of the accident. Plaintiffs, in turn, invoked their right, as provided by collective bargaining agreement, to present their grievances for resolution to a joint panel known as the Southern Conference Area Parcel Grievance Committee ("SCAPGC" or "the grievance committee"), which denied Thompson's grievance and upheld his discharge, but was unable to reach a decision as to Pendleton's discharge. The joint committee referred Pendleton's case to the deadlock panel which ultimately denied the grievance and upheld his discharge.

Following the adverse arbitration decisions, Pendleton and Thompson filed a claim against UPS and the Union under Section 301 of the National Labor Relations Act, 29 U.S.C. § 185 (1976), in the United States District Court for the Western District of Tennessee, alleging only that no just cause existed to justify their discharge and that the Union had failed to represent them fairly by negligently investigating and presenting their grievances.

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1. "a" references are to the Appendix in the United States Court of Appeals for the Sixth Circuit.

However, plaintiffs "expanded and altered" their theories and claims at each stage of the litigation. (Pet. App. A3).<sup>2</sup> At the time that Chief Judge Robert M. McRae, Jr., of the district court issued his Order on Defendants' Motion for Summary Judgment he noted that "the stance taken by plaintiffs with respect to the alleged misconduct engaged in by the Union and the Company has changed a number of times during the course of this litigation." (Pet. App. B6). The plaintiffs no longer argued that the Union failed to represent them adequately in the preparation and presentation of their grievances. Indeed, they conceded that their union representative behaved "in a proper, aggressive and adverse manner toward the company." (Pet. App. B6).

In fact, the Union's representation was quite thorough. After the discharge, Thompson saw Bill Owens ("Owens"), assistant business agent for Teamsters Local 667, who contacted UPS, set up a meeting to discuss Thompson's discharge, and filed a grievance on Thompson's behalf challenging the UPS action. Pendleton also contacted Owens, and Owens filed a grievance for him. After the grievances were filed, Owens and steward James Darrell Clements went to the scenes of the accidents, investigated the circumstances, photographed the scenes, talked with the resident engineers of the Arkansas Highway Department, and examined the highway. Additionally, Owens collected newspaper articles to present to SCAPGC when it met to consider the grievances. (29a). Owens then notified both Thompson and Pendleton of the time and place where SCAPGC would meet and that they both could appear before the panel at union expense and present their cases if they desired. Thompson went to the SCAPGC meeting in Atlanta; Pendleton did not. (40a, 47a). Before either of the cases was presented to the SCAPGC, Owens met with UPS representatives and discussed the grievances and the evidence each side had to offer. (29a).

In addition to contending that they had been denied fair representation during their respective hearings by their union representative, Don Owens, plaintiffs also initially maintained that they had been prejudiced because their hearings were not scheduled back-to-back. (115a). Then upon discovering that the

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2. "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari.

hearings in fact had been scheduled and did occur back-to-back, plaintiffs shifted their argument to contend that the back-to-back scheduling of their hearings seriously prejudiced their respective grievances. (Pet. App. B7).

Finally, before the district court entered summary judgment, plaintiffs also significantly altered the thrust of their complaint against defendants. While they had initially contended that the representation afforded them by the Union during the actual course of their hearings was ineffective, they changed their position to maintain that the procedures used during the processing of their grievances were defective in that a determination had been reached by the members of the grievance committee even before the respective grievances were presented to them for review. Plaintiffs seemed to argue that they suffered not because they were not afforded fair and honest representation, but because their union representative did not use "below the table" tactics in attempting to have their discharges overturned. (Pet. App. B10). Specifically, plaintiffs argued that Owens should have signaled the grievance committee that he wanted to win these two grievances.

The district court rejected Pendleton's and Thompson's argument that extra-arbital factors prejudiced the plaintiffs in the proceedings before the grievance committee. It noted that plaintiffs relied only on a statement made by a member of the Executive Board of Local 667, who claimed to have heard Owens repeat a suspicious statement made by a member of the grievance committee. The court held that Clements' statement was "comprised of little fact . . . in fact, filled almost exclusively with opinion." (Pet. App. B10). Chief Judge McRae went on to say, *id.*:

Furthermore, even if plaintiffs could prove that the events surrounding the processing of their grievances transpired exactly as alleged, this court would be unwilling to find that the union did not exercise honesty and good faith in its representation of Plaintiffs. In fact, in this case Plaintiffs complain not that they were not afforded fair and honest representation, but their union did not use "below the table" tactics in attempting to have their discharges over-

turned. The instant lawsuit simply does not provide a vehicle for the airing of such grievances. Defendants' motion for summary judgment is therefore to be granted.

On reconsideration, the district court dealt only with Pendleton's and Thompson's now sole contention that the Union had breached its duty to represent them fairly by failing to "attempt to fix" the decision of the [grievance] committee." (Pet. App. C3). After noting that the plaintiffs had brought to the court's attention neither new factual authority nor factual developments which would convince it that error was committed in the grant of summary judgment, (Pet. App. C5), the court denied plaintiffs' Motion for Reconsideration. In its denial, the court also reiterated that its decision would have been no different "even if plaintiffs could prove that the events surrounding the processing of their grievances transpired exactly as alleged . . ." (Pet. App. C4).

Pendleton's and Thompson's theory continued to change after the district court denied their motion for reconsideration. Plaintiffs appealed to the United States Court of Appeals for the Sixth Circuit where they argued not that the unfairness before the grievance committee consisted of the failure of the union in the instant case to attempt to "reach" the committee on their behalf, but rather that the corruptness consisted of the existence of the practice of "signalling" to the committee. (Pet. App. A5-A6). Plaintiffs shifted their emphasis to attack the joint grievance committee itself, and they also claimed that the district court had misunderstood their argument on reconsideration.

The court of appeals held: "While we agree with the plaintiff that the district court may have slightly misconstrued their assertions [in their Motion for Reconsideration], we find that Summary Judgment is nevertheless appropriate in this case." (Pet. App. A7). The court noted that "the only evidence offered by the plaintiffs of corruption in the arbitration process is the double hearsay affidavit of Clements," and it agreed with the district court that such evidence, "not admissible at trial, should not be considered on a motion for summary judgment." *Id.* Furthermore, Pendleton's claim had been denied not by the allegedly corrupt joint committee, but instead by the deadlock panel, which had not been alleged to be corrupt. *Id.*

## ARGUMENT

Pendleton and Thompson have asked this Court to grant certiorari to decide two questions which they argued were answered wrongly by the court of appeals and merit review by this Court. One conclusive answer is that even if the court of appeals had made the errors with which it is charged, these are not questions which need or are entitled to this Court's attention. The other conclusive answer is that the court of appeals did not make any errors, and that there was ample basis for that court's decision.

### I.

#### PENDLETON AND THOMPSON'S PETITION RAISED NO QUESTIONS WHICH DESERVE CONSIDERATION BY THIS COURT.

Although the succeeding sections of this brief answer each of petitioners' questions on the merits, we begin by noting that none of those questions merits consideration by this Court under the standards of Supreme Court Rule 17.

Although now petitioners Pendleton and Thompson try to frame their principal argument in terms of a conflict with the standards set forth by this Court in *Vaca v. Sipes*, 386 U.S. 171 (1967), the real question before the court below, as it would be before this Court, is whether petitioners presented sufficient evidence to avoid the granting of summary judgment in favor of UPS. This is the same issue that was raised before the district court and the court of appeals and that has been thoroughly considered below. This Court has already established the legal principles governing the standards plaintiffs must meet to upset arbitration decisions and avoid summary judgment; here it is simply being asked to reapply them.

Second, even if the Court were called upon to determine whether the Sixth Circuit's brief order in this case posed legal issues which, in the abstract, merited this Court's attention, those issues were resolved by the court of appeals and the district court in a manner fully consistent with this Court's de-

cisions and in harmony with the decisions of the other courts of appeals which have faced the same issues.

Finally, the question answered in the Sixth Circuit's unpublished order denying Pendleton's and Thompson's attempt to avoid summary judgment is equally unworthy of this Court's attention. Even if the court of appeals had wrongly determined that Clements' statement had not been made on personal knowledge or facts admissible in evidence and, therefore, was not proper evidence to avoid a motion for summary judgment under Federal Rule of Civil Procedure 56(e), that resolution is neither egregiously unreasonable nor likely to influence the decision of any other case.

As the succeeding sections of this brief indicate, the court of appeals did not misread either § 301 of the Labor Management Relations Act or Rule 56 of the Federal Rules of Civil Procedure, but even if, *arguendo*, Pendleton and Thompson were correct in their view of the opinion below, they have failed to show any "special and important reasons" why this Court should review this case.

## II.

**THE COURT OF APPEALS CORRECTLY AFFIRMED THE SUMMARY JUDGMENT IN FAVOR OF UPS SINCE THE PLAINTIFFS PRESENTED NO EVIDENCE RAISING ANY ISSUE OF MATERIAL FACT REGARDING THE FAIRNESS OR ADEQUACY OF THE UNION'S PROCESSING AND PRESENTATION OF THEIR GRIEVANCES.**

Unless the Union breached the duty of fair representation it owed Pendleton<sup>3</sup> and Thompson, the final and binding decisions of SCAPGC bar this suit. *See, e.g., Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976). Because Pendleton and Thompson failed to present evidence establishing a genuine issue as to any material facts, the district court correctly granted UPS' motion for summary judgment. The court of appeals properly affirmed.

**A. There Was No Evidence of Lack of Fair Representation by the Union in the Investigating, Processing, or Presenting of Pendleton's and Thompson's Grievances.**

In *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976), this Court emphasized the finality to which the determination of a grievance committee is entitled. The Court observed, *id.* at 571:

Petitioners are not entitled to relitigate their discharge merely because they offered newly discovered evidence that the charges against them were false and that in fact they were fired without cause. The grievance processes cannot be expected to be error-free. The finality provision has sufficient force to surmount occasional instances of mistake.

Under *Hines*, Pendleton and Thompson must show not only that UPS was wrong in discharging them as a result of the accidents which occurred in March and April, 1979, but in addition that the Union failed to afford them fair representation. *Id.*

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3. Pendleton was not even a member of the Union; yet Owens sought the vindication of Pendleton as forcefully and earnestly as he did that of Thompson, a Union member.

This Court established the boundaries of the duty of a union to represent its members fairly in *Vaca v. Sipes*, 386 U.S. 171 (1976). There the Court upheld a union's refusal to take a union member's grievance to arbitration, stating that: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190. Justice White (the author of the majority opinions in both *Hines* and *Vaca*) noted in *Vaca* that even a union's failure to take a meritorious grievance to arbitration does not constitute a breach of this duty unless the union acted arbitrarily or in bad faith. *Id.* at 192-95. In *Hines*, the Court added that a union's errors in judgment would not be sufficient to show a breach of the duty. 424 U.S. at 571.

The district court entered summary judgment in favor of UPS, and the court of appeals affirmed, because of the failure of Pendleton and Thompson to present evidence of any breach of the duty of fair representation this court's decisions demand. Not only do the facts make clear the efforts of the Union to afford Pendleton and Thompson fair representation, but Pendleton and Thompson have conceded their satisfaction with Owens' preparation and presentation of their grievances.

**B. No Competent, Material Evidence Was Offered To Establish That Finality Should Not Be Accorded to the Decision of SCAPGC Denying the Grievances.**

In their argument in this Court, Pendleton and Thompson attempt to upset the SCAPGC decision by mounting a frontal attack against the concept of the joint committee method of determining grievances. However, cases cited by petitioners in support of their arguments refute their assertions. These cases either strongly emphasize the importance of the principles of finality of arbitration decisions or turn on facts that have nothing to do with joint arbitration panels generally or the operation of the joint panel in the instant case. In addition, Rule 56 of the Federal Rules of Civil Procedure, which petitioners seek to circumvent, clearly forbids Pendleton's and Thompson's reliance upon mere opinions and beliefs.

Pendleton and Thompson rely on *Barrentine v. Arkansas-Best Freight System*, 615 F.2d 1194 (8th Cir. 1980), for the proposition that joint labor/management arbitration panels are inherently suspect. Yet in *Barrentine* the court rejected the argument advanced by petitioners that joint arbitration committees are particularly subject to abuse and therefore are suspect. It held that the joint committee is a valid method of arbitration and its decisions are final so long as there is no breach of the duty of fair representation. And *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), also relied upon by Pendleton and Thompson, did not even involve joint panels. There this Court held an arbitration process corrupt only because one of the supposedly neutral arbitrators on the panel had as his customer one of the parties to the proceedings and had been paid by that party for services as an engineering consultant including services on projects which were involved in the arbitration.

Absent such blatant conflicts of interest, courts have been extremely reluctant to upset arbitrators' decisions. See, e.g., *International Produce v. A/S Rosshavet*, 638 F.2d 548 (2d Cir. 1981) (fact that neutral arbitrator was a nonparty witness to another arbitration involving the same law firms involved in arbitration in which he sat in decision did not require disqualification). See also *Sidarma Societa Italiana Di Armamento Spa v. Holt Marine Industries*, 515 F. Supp. 1302, 1307 (S.D.N.Y. 1981) (to set aside an award for arbitrator partiality "the interest or bias must be direct, definite and capable of demonstration rather than remote, uncertain, or speculative").

Furthermore, decisions of joint arbitration panels, such as SCAPGC, are accorded the same degree of finality and conclusiveness as the decision of a single arbitrator jointly chosen by the parties. The SCAPGC is exactly the same type of tribunal whose use was sanctioned by this Court in *United Parcel Service v. Mitchell*, 451 U.S. 56, 58 (1981) (upholding the decision of a panel of the Atlantic Area Parcel Grievance Committee, composed of three union and three company representatives, denying an employee's grievance contesting his discharge).

Pendleton and Thompson failed to offer even one word of competent evidence to support their assertion that some kind of collusion existed between UPS and the Union generally or in these specific cases. Instead, relying upon assertions of a union steward concerning Owens' repetition of what a member of the grievance committee allegedly said to Owens, Pendleton and Thompson seek to castigate the whole grievance machinery of UPS and the Union by reliance upon opinions and beliefs. Federal Rule of Civil Procedure 56(e) forbids this. Rule 56(e) specifies that: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the client is competent to testify as to matters stated therein."

J. Moore and J. Wicker in 6 *Moore's Federal Practice* § 56.22[1], at 56-1312 — 56-1318 (2d ed. 1982), discuss the appropriate form affidavits opposing or supporting a motion for summary judgment should take: "Affidavits containing statements made merely 'on information and belief' will be disregarded. Hearsay testimony and opinion testimony that would not be admissible if testified to at the trial may not be properly set forth in an affidavit." (footnote omitted). In addition, C. Wright, A. Miller, and M. Kane in 10A *Federal Practice and Procedure* § 2722, at 56 (2d ed. 1983), indicate the special care courts take to insure that affidavits are presented in the proper form: "It should be remembered that affidavits are ex parte documents. The affiants are not subject to cross-examination and their demeanor cannot be evaluated. Consequently, affidavits offered on a summary judgment motion are likely to be scrutinized carefully by the court to evaluate their value and to determine whether they meet the standards prescribed in Rule 56(e) as to form and content . . ." (footnote omitted).

Furthermore, lower courts have had no trouble following the standards prescribed by Rule 56(e). For example, in the leading case of *United States v. Dibble*, 429 F.2d 598 (9th Cir. 1970), the court of appeals specifically relied upon the requirements of Rule 56(e) that affidavits be made on personal knowledge and set forth facts admissible in evidence in reversing the lower court. In the instant case, the only evidence petitioners

offered to support their latest theory and oppose UPS' motion for summary judgment consisted of opinion, belief, and double hearsay.

### CONCLUSION

For all of these reasons, the petition for certiorari should be denied.

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